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Real Estate Brokers: The Procuring Cause

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REAL ESTATE BROKERS: THE PROCURING CAUSE

AS A GENERAL PROPOSITION, where the transaction which a real estate broker was employed to negotiate is consummated, he is entitled to his commission if, and only if, he is the procuring cause of that transaction.[1]

While the Illinois courts have consistently followed this rule, they have not always used the same terminology when doing so. Thus, Illinois courts have held that a broker is entitled to his commission when he is the "procuring cause of the sale,"[2] when he is the "proximate cause of the sale,"[3] when he has "procured a buyer ready, able and willing to purchase on terms proposed by the owner,"[4] and when he has "presented to his employer a purchaser who enters into a valid, binding and enforceable contract with his employer."[5]

It is the purpose of this section to examine the meaning of the term "procuring cause" as it relates to the real estate broker's right to a commission, and to determine under what conditions the Illinois courts will hold that a real estate broker is the procuring cause. The question as to whether the broker operated under a valid contract of employment, while essential in determining his right to a commission, is omitted from this section, since it is dealt with elsewhere in this symposium.[6]

PROXIMATE CAUSE

The methods which might be employed by a broker attempting to bring about the sale of real estate, of course, are many. Therefore, each case creates a new question of fact for the jury, and the jury's decision as to whether or not a broker was the procuring cause of a sale will not be disturbed on review, unless clearly against the manifest weight of the evidence.[7] However, the Illinois

1 5 I.L.P., *Brokers* § 79 (1953).

2 Doss v. Kirk, 8 Ill. App. 2d 536, 132 N.E.2d 49 (3d Dist. 1956).

3 Waghorne v. Hogstrom, 11 Ill. App. 2d 345, 137 N.E.2d 497 (2d Dist. 1956); Murawaka v. Boeger, 219 Ill. App. 241 (1st Dist. 1920); Baumgartl v. Hoyne, 54 Ill. App. 497 (1st Dist. 1894).

4 Monroe v. Snow, 131 Ill. 126, 23 N.E. 401 (1890).

5 Wilson v. Mason, 158 Ill. 304, 42 N.E. 134 (1895).

6 See § 1, Licenses, Regulation and Employment of Brokers, at n.26 *et seq.*

7 Read v. Tate, 20 Ill. App. 2d 147, 155 N.E.2d 377 (3d Dist. 1959); Richman v. Levin, 152 Ill. App. 40 (1st Dist. 1909); Keeler v. Grace, 27 Ill. App. 427 (1st Dist. 1888).

courts have laid down one general principle which should be used in all cases deciding the question of procuring cause. That is: the real estate broker, in order to earn his commission, must be the direct and proximate cause of the transaction, and not merely the cause of causes.[8]

The meaning of this rule is aptly illustrated by *Baumgartl v. Hoyne*.[9] There, the plaintiff, a real estate broker, was employed to sell certain land belonging to the defendant. The broker showed the property to several persons, including a Mr. Strauss. Strauss, in the hope of earning a commission for himself, then showed the property to a Mr. Rosenberg, who subsequently purchased the land and sold it to a syndicate composed of himself and several others, some of whom had been approached at first by the plaintiff. The plaintiff contended that he, having shown the property to Strauss who then showed it to the ultimate purchaser, Rosenberg, was the procuring cause of the sale.

The court, however, held that the evidence did not sustain the plaintiff's contention. "It is the proximate cause of which the law takes notice," said the court, "and not the *causa causarum* [cause of causes] . . . . The proximate cause of an act is that which produces it without the interposition of an independent agency not the probable result of the first cause."[10] In the *Baumgartl* case it was not probable that Strauss, of his own accord and for his own purposes, would present the property to Rosenberg. Therefore, between all that was done by the plaintiff, and the final sale to Rosenberg, there intervened an entirely independent agency, the decision of Strauss to show the property to Rosenberg in the hope of earning a commission.

Bringing the Parties Together

Perhaps the most common means by which the real estate broker becomes the procuring cause is that of bringing together the parties who ultimately consummate the transaction. While the

8 Waghorne v. Hogstrom, *supra* note 3; Murawaka v. Boeger, *supra* note 3; Peek v. Slifer, 122 Ill. App. 21 (2d Dist. 1905); Baumgartl v. Hoyne, *supra* note 3.

9 54 Ill. App. 497 (1st Dist. 1894).

10 *Id.* at 501.

broker usually brings the parties together by personally introducing them to each other, this is not his only means.[11]

In *Adams v. Decker*,[12] the evidence showed that a broker merely sent to his principal the party who ultimately purchased the property. The court held that this evidence was sufficient to warrant a finding that the broker was instrumental in bringing the parties together and was, therefore, the procuring cause of the sale.

In *Cowan v. Day*,[13] the court went a step further, and held that evidence that a friend of the broker, at the request of the broker, informed the ultimate purchaser that the property was for sale, was sufficient ground upon which to find that the broker was the procuring cause of the sale. The court stated that, although the broker did not personally introduce the parties, his efforts, which brought the parties together, were, nevertheless, the procuring cause of the sale.

Although there are no Illinois cases specifically so holding, there are many cases which indicate that in order for the broker to become the procuring cause, it is not necessary that he ever show the property or that he take part in any of the negotiations.[14] However, it has been held that where the broker had brought the parties together, the fact that others participated in the negotiations,[15] or that the transaction was concluded without his presence or without his knowledge,[16] will not preclude his being the procuring cause.

Conducting Negotiations

On the other hand, it is entirely possible that a real estate broker may become the procuring cause on the basis of negotiations conducted by him although he had nothing to do with bringing the parties together. Such a case is found in *Burns v. Sullivan*,[17]

11 Mitchell v. Geister, 337 Ill. App. 390, 86 N.E.2d 293 (2d Dist. 1949).

12 34 Ill. App. 17 (2d Dist. 1889).

13 156 Ill. App. 105 (3d Dist. 1910).

14 Glass v. Liberty Nat'l Bank of Chicago, 326 Ill. App. 251, 61 N.E.2d 167 (1st Dist. 1945); Cowan v. Day, *supra* note 13; Adams v. Decker, *supra* note 12.

15 Woolf v. Hamburger, 201 Ill. App. 612 (1st Dist. 1916), where terms were not reached until negotiations were conducted by a second broker hired by the original broker.

16 Day v. Porter, 161 Ill. 235, 43 N.E. 1073 (1896); Voellinger v. Kohl, 261 Ill. App. 271 (4th Dist. 1931); Hawkins v. Taylor, 186 Ill. App. 355 (2d Dist. 1914); Pridmore v. Wilson, 159 Ill. App. 343 (1st Dist. 1911).

17 192 Ill. App. 127 (1st Dist. 1915).

where the plaintiff, a broker, was the first to show the property to the purchaser and the first to introduce the purchaser to the seller. Unable to come to terms with the seller, the purchaser began looking at other property being shown by a second broker, who also listed the seller's property. Upon hearing that the purchaser was interested in the seller's property, the second broker re-opened negotiations between the parties, and a sale was finally consummated. The court held that it was clearly the negotiations carried on by the second broker which brought about the sale, and that the second broker was the procuring cause, in spite of the fact that the plaintiff had brought the parties together.

MULTIPLE BROKERS

The *Burns* case also points up the proposition that where more than one broker is employed to secure a buyer for real estate, in the absence of a contract to the contrary,[18] only one commission will become due when a purchaser has been found, and the commission will be due only to the broker who can show that he was the procuring cause of the sale.[19]

In *Morton v. Barney*,[20] the court held that where one broker had brought about a lease for fifteen years, another broker who had attempted to bring about a lease for ninety-nine years could not have been the procuring cause of the lease finally consummated, even though it was the second broker who had first made the parties aware of each other. In so holding, the court, quoting *Whitcomb v. Bacon*,[21] said, " 'Where several brokers have each endeavored to bring about a sale which is finally consummated, it may happen that each has contributed something without which the result would not have been reached. . . . In such a case, in the absence of any express contract, that one only is entitled to a commission who can show that his services were the really effective means of bringing about the sale.' " Quoting from *Sibbald v.*

18 5 I.L.P., *Brokers* § 80 (1953).

19 Chicago Title & Trust Co. v. Guild, 323 Ill. App. 608, 56 N.E.2d 659 (2d Dist. 1944); Burns v. Sullivan, *supra* note 17; Morton v. Barney, 140 Ill. App. 333 (1st Dist. 1908); Peek v. Slifer, 122 Ill. App. 21 (2d Dist. 1905).

20 *Supra* note 19, at 342.

21 170 Mass. 479, 482, 49 N.E. 742, 743 (1898).

Bethlehem Co.,[22] the court stated, " 'A broker is never entitled to a commission for unsuccessful efforts.' "

The rule that the law will recognize only one procuring cause for any single transaction apparently is based upon the premise that although a seller hires more than one broker to obtain a buyer for his property, he contemplates paying only one commission. Without this rule, a seller who has hired more than one broker might find himself subjected to suits by each broker and, ultimately, might have to pay several commissions for a single sale.[23]

While it might be argued that where several brokers claim the same commission the commission might be split among them, there seem to be no Illinois cases supporting this view. Moreover, the Illinois courts have implemented the sole procuring cause rule by giving the principal from whom several brokers are claiming a commission the right to compel each of them to interplead.[24] Thus, the sole procuring cause can be determined without the principal's being subjected to two or more separate suits, each with its own records and evidence, and thereby possibly having to answer multiple judgments.[25]

It should be pointed out, however, that there are occasions when a seller, if he is not careful, may find himself liable for more than one commission, the sole procuring cause rule notwithstanding. In *Sachsel v. Farrar*,[26] a property owner employed two brokers to secure a purchaser for his land. Upon the representation of one of the brokers that he had found such a purchaser, the principal promised to pay the commission to him. Subsequently, the other broker claimed that he was the procuring cause of the sale and entitled to the commission. The seller then sought to have the brokers interplead in order to determine which broker had a right to the commission. The court, however, held that an interpleader action would not lie in this case. While interpleader will be allowed where more than one broker claims to have been the procuring cause of the sale, and, therefore, entitled to a commis-

22 83 N.Y. 378, 383 (1881).

23 Noble v. Carruthers, 235 Ill. App. 1, 8 (1st Dist. 1924) (concurring opinion).

24 Noble v. Carruthers, *supra* note 23; Snow v. Ulrich, 126 Ill. App. 493 (1st Dist. 1906); Sachsel v. Farrar, 35 Ill. App. 277 (1st Dist. 1889).

25 Noble v. Carruthers, *supra* note 23, at 8.

26 *Supra* note 24.

sion, it will not be allowed where one broker claims payment because he was the procuring cause, and the other broker claims payment under a special agreement with the principal. Here, the seller had bound himself to pay a commission to one of the brokers, regardless of whether or not that broker was the procuring cause of the sale. Thus, the other broker, if he could prove that he had been the procuring cause of the sale, might also become entitled to a commission, and the seller, thereby, would become liable to each broker for a commission.

Supplying Information

Illinois courts have said many times that a real estate broker may be the procuring cause where the sale is effectuated through information derived through him. However, it seems that in most of the cases which so state, the broker actually did more than just disseminate information.[27] *Glass v. Liberty Nat'l Bank of Chicago*[28] is an exception. In the *Glass* case, the broker, was one of many who listed the seller's property. He sent to the attorney for the ultimate purchaser, at the attorney's request, a detailed written statement about the property. Within a week, the attorney's client, through negotiations handled by the attorney, purchased the property. The court, in holding that there were sufficient facts upon which to find that the broker was the procuring cause of the sale, said that since the buyer had acted on the basis of information his attorney had received from the broker, the sale was brought about or induced through the broker by means of information derived from him. In view of this, the fact that the broker had no contact with the purchaser prior to the sale, that he did not introduce the parties and that he did not take part in the negotiations, had no effect upon his right to a commission.

Abandonment

There are situations in which, regardless of how much the broker has done to effectuate a sale of his principal's land, he will be precluded from claiming a commission on the basis of his being

27 Read v. Tate, 20 Ill. App. 2d 147, 155 N.E.2d 377 (3d Dist. 1959), where the broker introduced the parties; Doss v. Kirk, 8 Ill. App. 2d 536, 132 N.E.2d 49 (3d Dist. 1956), where the broker conducted negotiations.

28 326 Ill. App. 251, 61 N.E.2d 167 (1st Dist. 1945).

the procuring cause of the sale. The foremost of these situations is that in which the broker has abandoned his efforts to bring about the transaction, prior to its consummation.

Mammen v. Snodgrass[29] offers an excellent example of such a situation. There the broker had a non-exclusive written contract to sell his principal's farm. He presented to his principal an offer from the ultimate purchaser along with one hundred dollars in earnest money. The offer was rejected by the principal. Thereafter, the broker continued to show the property for about nine months. At the end of this time, the broker informed both the principal and the purchaser that he was leaving town for an extended period of time. The broker returned the earnest money to the purchaser, saying that if he was still interested in the property, he could deal with the owner himself. The broker remained away for two months, and two days after his return, the purchaser and the owner concluded a sale of the property. The court reversed a lower court's finding that the broker had been the procuring cause of the sale. In so doing, the court stated that unsuccessful negotiations do not form the basis for a commission where the broker had for a long time ceased negotiations with the ultimate purchaser, and abandoned all efforts to induce him to take the property. "A time must necessarily arrive after a prospective purchaser has declined to purchase," said the court, "when the owner may treat the negotiations at an end and begin an entirely new and independent solicitation."[30]

In the *Mammen* case, the length of time following the broker's attempts to negotiate between the parties, his subsequent inactivity, his returning the earnest money and his statement to the effect that the purchaser could deal directly with the owner, all seemed to indicate that the broker had abandoned his efforts to

29 13 Ill. App. 2d 538, 142 N.E.2d 791 (3d Dist. 1957).

30 *Id.* at 541, 142 N.E.2d at 793. For cases with similar holdings see: Kaplin v. Birk, 349 Ill. App. 538, 111 N.E.2d 377 (1st Dist. 1957) where the broker was held to have abandoned his efforts after the purchaser had said that he was no longer interested in the property; Weisjohn v. Bell, 316 Ill. App. 62, 43 N.E.2d 688 (1st Dist. 1942) where the seller had told the broker that she was about to close at a certain price and asked him whether he could bring in a better offer but the broker failed to reply. Held: the broker had abandoned his efforts to procure a buyer; Carlson v. Nathan, 43 Ill. App. 364 (1st Dist. 1891), where the broker remained inactive for one month during which the seller negotiated a sale on his own to a prospect presented by the broker, the broker was held to have abandoned his efforts to sell the property.

sell the property. Thus, he could not be considered the procuring cause of a sale arising out of later negotiations.

Exactly where the court will draw the line in deciding whether a broker has abandoned his efforts to sell is difficult to determine. In *Doss v. Kirk*,[31] where the seller had told the broker to take the property off his list, after unsuccessful negotiations with a party presented by the broker, and then negotiated a sale to that party six days later, the court held the broker to have been the procuring cause of the sale. The fact that the broker had introduced the parties and that all of the information leading to the sale had come to both parties through the efforts of the broker constituted ample evidence that the broker was the procuring cause of the sale, notwithstanding the fact that the seller had told the broker to take the property off his list six days prior to the sale.

A Different Transaction

Another situation in which the real estate broker cannot successfully claim to have been the procuring cause of the transaction is that where the transaction consummated differs substantially from that contemplated in the contract of employment. In such a case, it does not matter how much the broker did to bring about the final transaction, he will not be entitled to his commission.

The case most frequently cited in support of this rule is *Morton v. Barney*.[32] There the broker submitted to the purchaser an offer to sell certain unimproved land or to lease it for a term of ninety-nine years. It was through this broker that the parties first knew of each other. The purchaser rejected the initial offer but subsequently leased the property for nineteen years through another broker. Although the first broker was denied his commission on several grounds, one being that he had never had a valid contract of employment with the seller, the court stated that, even if the broker had been under a contract with the seller, the transaction which he attempted to negotiate was so different from that which was ultimately consummated, that he could not have possibly been the procuring cause of the later transaction.[33]

31 8 Ill. App. 2d 536, 132 N.E.2d 49 (3d Dist. 1956).
32 140 Ill. App. 333 (1st Dist. 1908).
33 *Id.* at 342.

It has also been held that a broker under a contract to sell land, who secures a party who enters into a contract by which he may exercise the option of either going through with the sale or forfeiting his initial payments, cannot be said to have been the procuring cause of the transaction contemplated. He will be able to claim his commission only after the payments have been made, since only then has there been a sale.[34]

Of course, where the broker's efforts have brought about a sale, he will not be denied his commission merely because the terms of sale vary slightly from those contemplated in the contract of employment.[35]

Thus, in *Lawrence v. Atwood*,[36] a broker employed to sell certain land at ten thousand dollars down and the balance in two notes of ten thousand dollars each, was held to have been the procuring cause of a sale for one thousand dollars down and the balance in three notes of ten thousand dollars apiece. The court said that because the broker was the procuring cause of the sale, he was entitled to his commission, and the fact that the sale was on terms slightly different from those originally envisioned was not material.[37]

Such a rule is, of course, necessary in order to protect the broker who has been the procuring cause of the sale from the loss of his commission in a situation where the parties alter the terms slightly, and then claim that the broker did not procure the transaction contemplated in his employment contract.

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34 Lawrence v. Rhodes, 87 Ill. App. 672 (1st Dist. 1899), *rev'd on other grounds*, 188 Ill. 96, 58 N.E. 910 (1900); Murawaka v. Boeger, 219 Ill. App. 241 (1st Dist. 1920).

35 Read v. Tate, 20 Ill. App. 2d 147, 155 N.E.2d 377 (3d Dist. 1959); Mammen v. Snodgrass, 13 Ill. App. 2d 538, 142 N.E.2d 791 (3d Dist. 1957); McConaughy v. Mahannah, 28 Ill. App. 169 (2d Dist. 1888); Lawrence v. Atwood, 1 Ill. App. 217 (1st Dist. 1878).

36 1 Ill. App. 217 (1st Dist. 1878).

37 *Id.* at 222.